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IN THE

Supreme Court of the United States

October Term, 1960

No. 267

ALBERT G. GLASS,

Petitioner,

—v.—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITIONER'S REPLY BRIEF

LOUIS [illegible]ENDER
MOSES L. KOVE
Attorneys for Petitioner

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Respondent asserts in its answering brief that this Court is without jurisdiction to review Point II of the petition for a writ of certiorari. In support of its position, respondent argues that petitioner did not literally use the words "violation of the XIV Amendment of the Constitution of the United States" in the trial court or in petitioner's brief on appeal (respondent's brief, p. 24). For this reason and no other; respondent concludes that no Federal constitutional question was raised upon which the Court of Appeals of the State of New York could have acted in reviewing the judgment of conviction below.

Respondent concedes that petitioner did move in the trial court for a mistrial on the basis of the bias of the trial judge, and for the further reason that prejudicial remarks on the part of the trial court deprived petitioner of a fair trial as the result of newspaper and radio pub-

licity during the trial (respondent's brief, p. 24). Respondent also concedes that petitioner did not withdraw or abandon these grounds, but asserted them in the Court of Appeals (respondent's brief, p. 24). Respondent might well have said that it was also asserted in the intermediate Appellate Court, that is, the Appellate Division of the State of New York, which it in fact was, as will be indicated hereinafter.

Because of petitioner's failure to add the words "in violation of the XIV Amendment to the claimed denial of a fair trial, the respondent, or prosecutor in this case, seeks to foreclose a review by this Court of a trial and conviction which violated the fundamental aspects of fairness in a State criminal prosecution.

It is respectfully submitted that respondent errs in its contentions as aforesaid. The jurisdiction of this Court does not depend upon the use of any particular form of words or phrases. *St. Louis I. M. & S. R. Co.* v. *Starbird*, 243 U. S. 592, 598; *Braniff Airways* v. *Nebraska State Board*, 347 U. S. 590, 598-599.

This Court has repeatedly held that if the record as a whole shows either expressly or by clear intendment that petitioner has brought to the attention of the State court a Federal claim and the grounds therefor, the claim will be regarded as having been adequately presented. *St. Louis I. M. & S. R. Co.* v. *Starbird*, *supra*; *Braniff Airways* v. *Nebraska State Board*, *supra*; *Furman* v. *Nichol*, 8 Wall. 44, 56; *Stern and Gressman*, Supreme Court Practice, page 82 and cases cited.

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness, of course, requires an

absence of actual bias in the trial of cases." *In re Murchinson*, 349 U. S. 133, 136.

> "As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it, we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevent a fair trial." *Lisenba* v. *California*, 314 U. S. 219, 236.

Such unfairness exists when "Newspapers . . . deprive accused persons of their right of a fair trial, *Shepherd* v. *State of Florida*, 341 U. S. 50, 52, particularly where the trial court generates the publicity and thereby makes known his biased and prejudicial opinions on a matter which should be kept from the jury. *Briggs* v. *United States*, 6th C., 221 F. 2d 636, 639.

It is thus fundamentally clear that a Federal constitutional right is violated where a trial judge, either through bias against a defendant or as a result of a total disregard of his fundamental rights to a fair and impartial trial before a jury, publicly stigmatizes the defendant in such a manner as to cause his remarks to be conveyed to the jury through the media of newspapers and radio. The denial of a fair trial under these circumstances is accordingly sufficient to raise a Federal question reviewable by this Court on a petition for a writ of certiorari as long as it has been specifically called to the attention of the trial court and passed upon without abandonment through the State courts.

The record below reveals without question that the trial court was apprised by petitioner's counsel of the asserted

denial of petitioner's right to a fair trial as a result of the prejudicial remarks of the trial court, communicated to the jury through the media of newspapers and radio.

> "The Court: . . . All right, you don't have to belabor this point. *What you are urging upon me is that the newspaper publicity and the radio publicity created an atmosphere in which you say that your client could not receive a fair trial;* is that what you are bringing home to me?
>
> "Mr. Smith: Two points, expressed bias—
>
> "The Court: I am now talking of the second aspect of your motion.
>
> "Mr. Smith: As to the second aspect, your Honor has stated it better than I can state it.
>
> "The Court: I doubt it.
>
> "Mr. Smith: That is exactly it, and along the first point, I would like to give you some citations.
>
> "The Court: As to the first point, I don't need any citations whatsoever, because it is a well settled matter of law that if the Court is biased, the Court should not preside at the trial of a particular defendant against whom there is such a bias. To cite cases for that proposition would be a waste of time. That is elementary.
>
> *As to the second proposition, that if an atmosphere of such kind is in fact created, that also, is elementary.* Is there anything that you want to add?
>
> "Mr. Smith: No, sir.
>
> "The Court: All right". (R. 1610-1611, emphasis added).

The trial court thus not only was aware of the precise point, he actually took the words out of the mouth of petitioner's counsel. Indeed, he went further and said no citation of authority was necessary since "that . . . is elemen-

tary" (R. 1161). Having restrained petitioner's counsel from going further and asserting the specific authorities supporting his motion for a mistrial on these grounds, petitioner should not be precluded from review by this Court, as respondent maintains, for not asserting specifically that it was a violation of the XIV Amendment upon which petitioner relied.

The trial court, thus, passed upon the specific point and denied that defendant was deprived of a fair trial.

In the Appellate Division which affirmed the judgment of conviction without opinion, petitioner maintained that he had been deprived of a fair trial in Point 4 of the questions presented to that Court, as follows:

> "The trial court displayed in open court its bias against Glass (petitioner), and brought about newspaper and radio publicity during the trial of highly prejudicial, inadmissible, collateral matters which undoubtedly came to the attention of the jury, creating such an atmosphere as made impossible any fair consideration by the jury of the defense and precluded the possibility of a fair trial."

Of necessity, the affirmance of the judgment of conviction by the intermediate court without opinion resulted in a denial of this very contention made by the petitioner in that court, and was necessarily involved in its decision. Similarly, as the point was raised in Point III of petitioner's brief in the Court of Appeals of the State of New York, the affirmance of the judgment of conviction by the Court of Appeals without opinion necessarily involved a denial of the petitioner's claim as made below and in the trial court.

Respondent contends in its brief, at page 24, that had present counsel been substituted in time to move to amend the remittitur of the Court of Appeals of the State of New York in order to indicate that that Court had passed upon this question, the motion would have been denied because petitioner had failed to use the specific words "violation of the XIV Amendment of the Constitution of the United States". No New York authority is cited for such a statement, and it is respectfully submitted that this Court's jurisdiction should not be foreclosed merely because of the bare assertion of respondent to this effect. An examination of the entire record in the trial court below and in the points asserted by petitioner in both the intermediate Court of Appeals and in the Court of Appeals of the State of New York would seem to indicate without question that petitioner clearly intended, and did in fact, raise a Federal claim of violation of the XIV Amendment of the Constitution of the United States by denying him a fair trial, and that the Court of Appeals, just as the Appellate Division, necessarily reviewed that question in its decision.

If there be any doubt that of necessity the Court of Appeals of the State of New York passed upon this Federal question in view of the entire record, petitioner respectfully requests that this cause be continued for an appropriate period to enable him to apply to the Court of Appeals of the State of New York for an amendment of the remittitur. *Loftus* v. *People of the State of Illinois*, 334 U. S. 804, 805-806; *Herb* v. *Pitcairn*, 324 U. S. 117, 127-128.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be granted.

LOUIS BENDER
MOSES L. KOVE
Attorneys for Petitioner